

EXHIBIT

26

DEFENDANTS' MOTION TO EXCLUDE THE
TESTIMONY OF
DR. CHRISTOPHER TEAF

05-CV-0329 GKF-PJC

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE PONCA TRIBE OF INDIANS)	
OF OKLAHOMA, et al.,)	
)	
Plaintiffs,)	
)	
vs.)	Case Number CIV-05-445-C
)	
CONTINENTAL CARBON)	
COMPANY, et al.,)	
)	
Defendants/Third Party Plaintiffs,)	
)	
vs.)	
)	
CONOCOPHILLIPS, a Corporation,)	
)	
Third Party Defendant.)	

MEMORANDUM OPINION AND ORDER

Dr. Christopher Teaf is a toxicologist retained by Plaintiffs to evaluate the characteristics and potential health effects of chemicals emitted by Continental Carbon's Ponca City plant. Continental Carbon seeks to exclude Dr. Teaf's testimony, arguing that it is irrelevant and unreliable.

STANDARD

Federal Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Courts must act as gatekeepers to ensure that all expert testimony admitted at trial is both relevant and reliable. Dodge v. Cotter Corp., 328 F.3d 1212, 1221 (10th Cir. 2003). The proponent of an expert bears the burden of demonstrating that the requisite admissibility requirements are met by a preponderance of the evidence. Fed. R. Evid. 702 advisory committee's note.

This gatekeeping role necessitates a two-part inquiry. Norris v. Baxter Healthcare Corp., 397 F.3d 878, 883 (10th Cir. 2005). First, courts must “determine if the expert’s proffered testimony . . . has ‘a reliable basis in the knowledge and experience of his [or her] discipline.’” Id. at 883-84 (quoting Bitler v. A.O. Smith Corp., 391 F.3d 1114, 1120 (10th Cir. 2004)). At this stage of the analysis, courts must conduct a preliminary inquiry into the expert’s qualifications and the admissibility of the proffered evidence. Bitler, 391 F.3d at 1120. This entails an examination of “‘whether the reasoning or methodology underlying the testimony is scientifically valid.’” Id. (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-93 (1993)). Second, courts must “‘inquire into whether proposed testimony is sufficiently ‘relevant to the task at hand.’” Norris, 397 F.3d at 884 (quoting Daubert, 509 U.S. at 597) (footnote omitted). Here courts examine whether the proposed testimony is logically related to a material issue and whether it would aid the trier of fact. Id. at n.2; Bitler, 391 F.3d at 1121.

To assess the reliability of proffered expert testimony, courts should consider, among other factors, “(1) whether the opinion at issue is susceptible to testing and has been subjected to such testing; (2) whether the opinion has been subjected to peer review; (3)

whether there is a known or potential rate of error associated with the methodology used and whether there are standards controlling the technique's operation; and (4) whether the theory has been accepted in the scientific community.” Dodge, 328 F.3d at 1222. Rather than assessing the reliability of an expert's conclusions, courts should instead focus on the methodology and reasoning employed. Id.

DISCUSSION

A. Expert Report

Dr. Teaf holds a Ph.D. in toxicology and is Director of Toxicology for Hazardous Substance & Waste Management at the Florida State University Center for Biomedical and Toxicological Research and Waste Management. The bulk of his research has been in the area of risk assessment for human exposure to occupational and environmental chemicals. Much of his work involves determining the adverse health effects of human exposure to various chemicals

In his expert report, Dr. Teaf begins by discussing Oklahoma nuisance statutes. According to Dr. Teaf, many Ponca City residents have been exposed to harmful substances, odors, and irritants as a result of Continental Carbon's historical and ongoing emissions. This opinion is based on numerous factors, the strongest of which is the black substance found on properties surrounding the plant. Dr. Teaf also bases his opinion on interviews, depositions, photographs, and videos showing visible airborne releases of dark and light clouds from Continental Carbon's plant. He also discusses environmental test results, emissions reports, and numerous notices and agreements between Continental Carbon and

the Oklahoma Department of Environmental Quality (ODEQ). Based on all of this information, Dr. Teaf concludes that the particles found on Plaintiffs' properties originated at Continental Carbon's plant.

Dr. Teaf then discusses the characteristics and potential health effects of Continental Carbon's emissions. The toxicologically significant substances that, based on plant information, have historically been emitted in significant quantities include carbon disulfide, carbonyl sulfide, hydrogen cyanide, hydrogen sulfide, nitrogen oxides, sulfur oxides, carbon monoxide, and fine/ultrafine particulate matter. Dr. Teaf lists the characteristics of each of these substances along with the potential health risks associated with their presence in sufficient quantities. According to Dr. Teaf, many of these substances are linked to odors, eye irritation and visual disturbances, headache, dizziness, skin irritation, and difficulty breathing. Dr. Teaf further opines that Continental Carbon's emissions are the source of the odors, irritation, and visual impacts experienced by many residents throughout Ponca City.

Dr. Teaf explains that the potential health effects suffered by individuals as a result of exposure to airborne particles depends upon a variety of factors, none of which he attempted to analyze in his report. He states that, based upon modeling conducted by the Center for Toxicology & Environmental Health, concentrations of airborne particulate matter emitted from Continental Carbon are greater than what is generally considered safe for the public.

B. Continental Carbon's Motion

Initially, Continental Carbon argues that Dr. Teaf's conclusion that it is causing or contributing to a nuisance should be excluded because it usurps the jury's role of deciding the ultimate issue in the case, namely whether Continental Carbon is legally responsible for causing a nuisance. It further argues that Dr. Teaf is not qualified to discuss what constitutes a nuisance.

Second, Continental Carbon argues that Dr. Teaf's testimony linking Continental Carbon's emissions to odors, irritation, and visual impacts should be excluded because it is unreliable. Dr. Teaf did not calculate a dose or an exposure concentration for any of the Plaintiffs, and therefore he provides no quantitative basis for linking Continental Carbon's emissions to Plaintiffs' complaints. Any "qualitative estimation" that Dr. Teaf might have made is insufficient. Additionally, the mere fact that complainants have linked Continental Carbon's emissions to their symptoms does not demonstrate that such a link exists. Finally, Dr. Teaf failed to consider the possibility that ConocoPhillips might be the cause of Plaintiffs' symptoms, even though he agrees that ConocoPhillips emits in large quantities many of the same substances as Continental Carbon.

Continental Carbon also argues that Dr. Teaf is unqualified to opine about the existence of a visual or aesthetic nuisance. He has no special expertise in this area and in fact agrees that a layperson could reach the same conclusions based upon a review of video footage, aerial photographs, and Plaintiffs' complaints and depositions.

Continental Carbon argues that portions of Dr. Teaf's proposed testimony would not aid the trier of fact. It seeks to exclude his testimony regarding various documents, depositions, testimony of other experts, ODEQ complaints, and contents of video footage and aerial photographs. According to Continental Carbon, all of these documents constitute hearsay and, because Dr. Teaf fails to analyze this information or link it to his conclusions, the testimony is nothing more than a recitation of fact and is therefore unhelpful. Plaintiffs should not be permitted to use Dr. Teaf's testimony as a means of admitting evidence that is potentially inadmissible.

Continental Carbon also seeks to exclude Dr. Teaf's testimony regarding the hypothetical health impacts of its emissions because such testimony is irrelevant and highly prejudicial. Many of the symptoms discussed by Dr. Teaf are not at issue in this case. Additionally, many of the statements are extremely inflammatory and have no purpose other than persuading the jury to award damages based upon a fear of harmful health effects.

Finally, Continental Carbon asserts that Dr. Teaf's statements regarding Plaintiffs' exposure to carbon black should be excluded because he relies upon the unreliable opinions of Plaintiffs' air modeler, Mr. Hamlin. Additionally, Dr. Teaf fails to discuss how Mr. Hamlin's modeling indicates that Plaintiffs were exposed to sufficiently high levels of emissions.

The Court has carefully reviewed the arguments and supporting materials provided. Dr. Teaf will not be permitted to discuss Oklahoma nuisance statutes or opine that

Continental Carbon's emissions are causing a nuisance.* Dr. Teaf, although a highly trained toxicologist with years of experience in analyzing the health effects of various chemicals, has no legal training and therefore may not offer testimony regarding legal standards or "state legal conclusions drawn by applying the law to the facts." Okland Oil Co. v. Conoco Inc., 144 F.3d 1308, 1328 (10th Cir. 1998).

Dr. Teaf will be permitted to discuss the general types of health risks posed by substances shown to be emitted by Continental Carbon to the extent that the Court finds such testimony neither cumulative nor unduly time-consuming. Such testimony is relevant to Plaintiffs' nuisance claim as well as Plaintiffs' claim for damages relating to annoyance, discomfort, and insecurity. On cross-examination, Continental Carbon may attempt to demonstrate that something other than its Ponca City plant could cause the same or similar effects.

The Court finds, however, that Dr. Teaf has not performed the necessary analysis to testify that Continental Carbon is the cause of Plaintiffs' symptoms. Dr. Teaf did not attempt to determine the degree of Plaintiffs' exposure, if any, to the substances emitted by Continental Carbon. As a result, he has no basis to conclude that Plaintiffs are experiencing any particular symptom based upon exposure to any particular chemical. Therefore, his testimony linking the plant's emissions to Plaintiffs' symptoms is unreliable and will be excluded.

* This includes any discussion of a visual or aesthetic nuisance contained in Dr. Teaf's report.

To the extent that Dr. Teaf relied upon inadmissible evidence in forming his opinions, such evidence will not be admitted unless Plaintiffs' can demonstrate some relevant basis for doing so. Additionally, Dr. Teaf will not be permitted to testify about any of his opinions that are based solely upon the work done by Plaintiffs' expert, Mr. Hamlin, since the Court has previously excluded his testimony as unreliable.

CONCLUSION

Accordingly, Continental Carbon's Daubert motion (Dkt. No. 380) as it relates to the expert report and testimony of Dr. Christopher Teaf is GRANTED in part and DENIED in part.

IT IS SO ORDERED this 29th day of January, 2009.



ROBIN J. CAUTHRON
United States District Judge